Supreme Court, U.S.
FILED
MAY 16 2002
OFFICE OF THE CLERK

(2)

No. 01-1521

IN THE

Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN,
Petitioner,
v.
MCKESSON HBOC, INC., et al.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR THE MCKESSON RESPONDENTS

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May 16, 2002

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QUESTIONS PRESENTED

1. Whether this Court should decide whether the Treaty of Amity between the United States and Iran creates a private right of action against Iran for an American corporation to recover compensation for a taking of its property in Iran, where the court of appeals left undisturbed, and Iran has not challenged in its petition, the district court's holding that customary international law provides a separate and independent cause of action for the taking claim.

2. Whether the court of appeals' rejection of Iran's sovereign immunity claim conflicts with this Court's construction, in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), of the phrase "based upon" in the second clause of 28 U.S.C. § 1605(a)(2).

3. Whether the holding below, that subject matter jurisdiction under the FSIA's commercial activity exception exists because the freezing out of McKesson in its ownership of Pak Dairy caused direct effects in the United States without regard for the place of payment of McKesson's dividends, conflicts with this Court's opinion in *Weltover, Inc. v. Republic of Argentina*, 504 U.S. 607 (1992).

4. Whether the court of appeals erred in upholding the denial of Iran's motion for summary judgment on the issue of Iran's liability for expropriation.

PARTIES TO THE PROCEEDING

1. Respondent McKesson HBOC, Inc., a Delaware corporation, is the parent company of the following wholly-owned subsidiaries who are respondents and corporations organized under the laws of the State of California: Foremost Shir, Inc., Foremost Tehran, Inc. and Foremost Iran Corporation. These companies (collectively "McKesson") were appellees/cross-appellants below.

2. Respondent Overseas Private Investment Corporation ("OPIC") is a corporation organized under the laws of the United States. It is an agency of the United States established pursuant to 22 U.S.C. §§ 2191-2199. OPIC was also an appellee/cross-appellant below.

3. Petitioner, the Islamic Republic Iran ("Iran"), is a foreign state. It was appellant/cross-appellee below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, McKesson HBOC, Inc. states that it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In 1959, Foremost-McKesson, Inc., a Maryland corporation with its principal place of business in California,[1/] agreed to join with a group of Iranian citizens in establishing a dairy in Iran, the Sherkat Sahami Labaniat Pasteurize Pak ("Pak Dairy"). PA 160a.[2/] McKesson agreed to furnish "one-half of the required capital, and all the necessary management skills and personnel, engineering data, sources of material, procurement services, ingredients and packaging," to provide technical assistance as needed, and to license its trademarks, in exchange for 50 percent of the Dairy's stock, and the right to receive payments under a services agreement, equipment leases, supply contracts and the trademark license. *Id.;* PA 35a. In 1979, at the time of the Iranian Revolution, McKesson held 31 percent of the equity interest in Pak Dairy. PA 160a.

On January 22, 1982, McKesson and respondent the Overseas Private Investment Corporation ("OPIC") filed this action in the United States District Court for the District of Columbia against the Islamic Republic of Iran ("Iran"), several agencies or instrumentalities of Iran which were shareholders in and directors of Pak Dairy, and Pak Dairy itself.[3/] As amended on March 7, 1991, the complaint alleged that Iran, acting through its co-defendant government agencies and instrumentalities, systematically used its position as the majority shareholder to control the dairy's

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1/ Respondent McKesson HBOC, Inc. was known as "Foremost-McKesson" until July 27, 1983, and then as McKesson Corporation between that date and January 12, 1999. McKesson HBOC and the three wholly-owned subsidiaries that are also respondents are referred to collectively as "McKesson."

2/ "PA" refers to the appendix to Iran's petition.

3/ OPIC had insured a portion of McKesson's investment in Pak Dairy against expropriation and other risks.

board of directors in a manner that illegally deprived McKesson of its equity interest in Pak Dairy. L 172-L 176.[4/] Under Executive Order No. 12,294, 46 Fed. Reg. 14,111 (1981), the litigation was stayed while the plaintiffs presented their claims against Iran to the Iran-United States Claims Tribunal ("Claims Tribunal") in The Hague. PA 3a. The Claims Tribunal issued an award on April 10, 1986, ruling that (1) the Iranian Government had interfered with McKesson's property rights in Pak Dairy and had unlawfully deprived McKesson of the dividends declared by Pak Dairy in 1979 and 1980, but (2) the evidence did not establish that as of January 19, 1981, the Claims Tribunal's jurisdictional cut-off date, Iran's progressive interference with McKesson's property rights in Pak Dairy had, as yet, amounted to an expropriation of McKesson's equity interest. Because of the limits of its jurisdiction, The Tribunal expressed no opinion as to whether or when the expropriation claim ripened. *Foremost Tehran, Inc. v. The Government of the Islamic Republic of Iran et al.*, 10 Iran-United States Claims Trib. Rep. 228, 249-50 (1986) ("Tribunal Award") (L 187, L 206-L 207).

On April 1, 1988, McKesson revived this lawsuit by filing a motion for partial summary judgment against Iran on the issue of liability. McKesson alleged that Iran's "creeping expropriation" of its equity interest in the Dairy was completed soon after the 1981 cut-off date of the Claims Tribunal's jurisdiction. PA 4a, 98a.[5/] Iran filed a motion to dismiss on the basis of sovereign immunity. PA 4a. The district court denied Iran's motion, holding that Iran's

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4/ "L__" refers to McKesson's Lodging in this Court, which contains excerpts from the joint appendix in the court of appeals, the appendix to McKesson's petition for rehearing in the court of appeals, and the record in the district court.

5/ *See Dames & Moore v. Regan*, 453 U.S. 654, 684-85 (1981) ("those claims not within the jurisdiction of the Claims Tribunal will 'revive' and become judicially enforceable in U.S. courts").

immunity claim was barred under the third clause of Section 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). *Id.* Section 1605(a)(2)'s third clause provides an exception to immunity when the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a "direct effect" in the United States. 28 U.S.C. § 1605(a)(2).

Iran then filed its first interlocutory appeal, raising a number of the jurisdictional arguments that the district court had rejected.[6/] The court of appeals affirmed the district court's determination that the facts alleged by McKesson, if proven, met the direct effects test for subject matter jurisdiction under the third clause of Section 1605(a)(2). 905 F.2d 438, 450 (D.C. Cir. 1990) ("*McKesson I*") (PA 150a-153a). The court held that "[h]ere, the effects alleged were foreseeable, substantial and direct," and observed that "[t]he alleged effects of freezing-out American corporations in their ownership of Pak Dairy are at least as substantial and direct as effects alleged in prior cases in which this court and other circuits have found 'direct effects.'" PA 151a-152a.

The court of appeals remanded to the district court for more extensive findings on the degree of control exerted by Iran over Pak Dairy and over the shareholder entities alleged to be government-controlled. PA 146a. On remand, the district court found, on the basis of extensive evidence, that Iran's control was sufficient to overcome the presumption of separateness between a foreign state and its instrumentalities, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 626-27 (1983), and to render Iran responsible for the actions of its co-defendant agents on the Pak Dairy board of directors. PA 169a-171a.

6/ Of the arguments raised in that first appeal, only Iran's FSIA "direct effect" issue is raised in its present petition.

Iran argued on remand that this Court's opinion in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), which was issued after the court of appeals' decision in *McKesson I*, had changed the law applicable to this case by replacing the "substantial and foreseeable" test with an "immediate consequence" test. PA 165a. The district court rejected that argument, holding that the facts presented in *Weltover* were distinct from the instant case and *Weltover* could not be read as having overruled the conclusions of the district court and the court of appeals. PA 165a, 172a.

Iran filed a second interlocutory appeal. In its decision on that appeal, 52 F.3d 346 (D.C. Cir. 1995) ("*McKesson II*") (PA 158a), the court of appeals affirmed the judgment of the district court in all respects, including the finding of a principal-agent relationship between Iran and its co-defendant agencies and instrumentalities. On the "direct effects" issue, it held that:

> While *Weltover* changed the law by removing foreseeability and substantiality from consideration, it did not undercut the remaining reason we gave for applying the commercial activity exception of § 1605(a)(2) - that the effects were "direct." Because this portion of our prior opinion is unaffected by *Weltover*, it remains the law of the case, not subject to reconsideration in this second interlocutory appeal.

PA 168a. The court also pointed out in *McKesson II* that it had held in *McKesson I* that the direct effects of Iran's alleged actions included a cessation of all of the dairy's existing commercial ties with McKesson in the United States, including what had been a "constant flow of capital, management personnel, engineering, data, machinery, equipment materials and packaging, between the United

States and Iran to support the operation of Pak Dairy." PA 167a.[7]

Iran petitioned this Court for a writ of certiorari, arguing *inter alia* that the court of appeals' decision in *McKesson II* was in conflict with *Weltover* and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). *See* No. 95-644 Pet. 7-13 (filed Oct. 19, 1995) (L 152-L 157). This Court denied review. 516 U.S. 1045 (1996).

McKesson then renewed its motion for partial summary judgment as to Iran's liability for expropriating McKesson's investment in Pak Dairy. PA 4a. Iran filed a cross-motion for summary judgment, reiterating jurisdictional arguments that had been rejected by the court of appeals, and arguing that McKesson could not, as a matter of law, establish that Iran had expropriated its interest in Pak Dairy. *Id.* The district court granted McKesson's motion and denied Iran's cross-motion, ruling that the expropriation had been complete by April 5, 1982, when McKesson had been denied payment of its dividends for the fourth consecutive year. 1997 WL 361177 (D.D.C. June 23, 1997) (PA 115a). The court further held that McKesson had a valid cause of action that arose both under the Treaty of Amity[8] and under customary international law, and thus that it did not need to address whether McKesson also had a cause of action under Iranian law. PA 116a-123a & n. 23. It further held that Iran had failed to demonstrate the existence of any genuine issue of material fact regarding Iran's claim that McKesson had been required physically to "come to the company" in Iran for its

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7/ At the subsequent trial in the district court, testimony was presented that Pak Dairy held a board of directors meeting once each year at McKesson's offices in San Francisco, but those too were curtailed by Iran after the Revolution. L 485-L 486.

8/ Treaty of Amity, Economic Relations and Consular Rights, *signed* Aug. 15, 1955, *entered into force* June 16, 1957, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

dividends. The court also found, "based on the entire record in this case, including the opinion of the Claims Tribunal . . . that it would have been futile for McKesson to attempt to comply with the alleged come-to-the-company requirement." PA 112a; CA 22a. In addition, the court rejected Iran's argument that the withholding of dividends should not be considered in determining whether an expropriation had occurred because the dividends had not been payable in the United States and for that reason their nonpayment did not have a direct effect in the United States. PA 98a-102a, PA 110a-113a. On the latter point, the court observed that, unlike the plaintiffs in the cases cited by Iran, "McKesson is an American corporation"; accordingly, "Iran's discontinuing the dividend payments to McKesson (wherever they were payable) had a direct effect on McKesson in the United States." PA 101a.

The district court then held a four-week bench trial on damages, and subsequently entered judgment against Iran for $20,071,159.41, including simple prejudgment interest from 1982. 116 F. Supp. 2d 13, 42 (D.D.C. 2000) (PA 85a). Default judgments were entered against Iran's co-defendants. Plaintiffs sought compound prejudgment interest, but the court held that it was required under applicable principles of customary international law to award only simple interest. PA 80a-81a. On McKesson's motion for reconsideration, the court reiterated that it lacked authority to award compound interest, but added that even if it had discretion it would have awarded only simple interest because that was the practice at the Iran-U.S. Claims Tribunal. CA 17a.

Iran appealed for a third time, challenging the district court's findings of jurisdiction and

liability, as well as its valuation of McKesson's damages. PA 5a. McKesson cross-appealed on the issue of the district court's refusal to award compound prejudgment interest. *Id.* The court of appeals rejected Iran's jurisdictional arguments, reaffirming its ruling in *McKesson I* that the effects of freezing-out American corporations in their ownership of Pak Dairy were "at least as . . . direct as effects alleged in prior cases in which this court and other circuits have found direct effects." 271 F.3d 1101, 1106 (D.C. Cir. 2001) ("*McKesson III*") (PA 7a). The court also rejected as without merit Iran's contention that in *Nelson*, this Court "established an exclusionary principle under which no fact that could not have independently served as grounds for jurisdiction may serve as a basis for a foreign state's liability." *Id.* Thus, the court ruled, there was no need to determine whether the withholding of dividends provided a separate and independent basis for jurisdiction under the direct effects clause. *Id.*

The court of appeals similarly rejected all of Iran's damages arguments, and affirmed the district court's ruling that McKesson has a cause of action for expropriation under the Treaty of Amity.[9/] PA 10a-11a, 15a-16a. The court held, however, that although Iran had failed to show that Iranian law required shareholders physically to "come to the company" to collect their dividends (*i.e.*, through a representative), its unsupported and uncorroborated affidavits were sufficient to create an issue of fact as to whether Pak Dairy had adopted such a requirement for its shareholders because, the court believed, McKesson had adduced "no evidence to the contrary." PA 11a-13a. The court further ruled that the district court erred in holding that international law requires only simple interest, but held that

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9/ Iran also appealed the district court's holding that McKesson has a cause of action for expropriation under customary international law. The court of appeals did not address this issue separately, but simply sustained the existence of McKesson's cause of action.

the court did not abuse its discretion in denying McKesson's request for compound prejudgment interest. PA 18a-19a.

ARGUMENT

I. THIS COURT NEED NOT CONSIDER WHETHER MCKESSON HAS A CAUSE OF ACTION UNDER THE TREATY OF AMITY, BECAUSE THERE IS A SEPARATE AND INDEPENDENT CAUSE OF ACTION UNDER CUSTOMARY INTERNATIONAL LAW FOR WHICH IRAN HAS NOT SOUGHT REVIEW. IN ANY EVENT, IRAN' S POSITION IS WITHOUT MERIT AND DOES NOT WARRANT REVIEW.

Iran's petition questions the existence of a private right of action under the Treaty of Amity for Iran's expropriation of McKesson's investment in Pak Dairy; it does not challenge McKesson's alternate basis for the same claim under customary international law.[10/] The district court, however, held that McKesson's right of action against Iran arises under the Treaty of Amity, and also under customary international law. PA 116a-123a. This holding was not disturbed by the court of appeals. PA 1a-19a. Even if this Court were to grant review and rule in Iran's favor on the Treaty issue, that ruling could have no impact at all on McKesson's right of action under customary international law, and thus would have no substantive impact on the case. Thus, Iran essentially asks this Court to issue an advisory opinion on the meaning of the Treaty of Amity. *See Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (where there is an alternate and independent basis for decision by courts below,

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10/ Iran's first question presented is "[w]hether the Treaty of Amity between the United States and Iran creates a private right of action for the United States investor against Iran in the courts of the United States." Petition at i.

such that any opinion issued by this Court on question presented would be purely advisory, Court lacks jurisdiction to afford review); *Amalgamated Ass'n of Street, Elec. Railway & Motor Coach Employees of Am. v. Wisconsin Employment Relations Bd.*, 340 U.S. 416, 418 (1951) (holding that federal courts are "without power . . . to give advisory opinions which cannot affect the rights of the litigants in the case before it"); *District of Columbia v. Barry*, 387 F.2d 860, 861-62 (D.C. Cir. 1967) (where review was sought as to only one of several grounds for dismissing indictment, any decision court might issue could not affect rights of litigants before it and thus would constitute advisory opinion outside the scope of federal judicial power). Because Iran has raised no issue about the existence of a cause of action under customary international law, this is not an appropriate case in which to address the Treaty issue presented in the petition.

On the merits of the Treaty issue, moreover, Iran has failed to demonstrate any reason for this Court to review the court of appeals' decision. First, the conclusion reached by the courts below -- that Article IV of the Treaty gives rise to a private cause of action -- is in no way inconsistent with any of this Court's precedents, including *Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428 (1989), the case on which Iran principally relies. The issue in *Amerada Hess* was not, as it is here, whether treaty language gives rise to a private right of action, but rather whether Argentina, by signing certain international conventions, forfeited its sovereign immunity from federal jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 441-43. These are very different issues, as this Court has recognized. *See Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998) ("The Supreme Court has recognized that the question of whether a statue creates a private right of action is distinct from the question of whether a federal court has jurisdiction") (citing *National R.R. Passenger Corp. v.*

National Ass'n of R.R. Passengers, 414 U.S. 453, 456 (1974)).

The treaties at issue in *Amerada Hess*, moreover, differ from the Treaty of Amity in several important respects, not the least of which is the absence of any standard of compensation for violation of the general "rules of conduct" that they embody. *See* Geneva Convention on the High Seas, Apr. 29, 1958, art. 22, 13 U.S.T. 2312, 2318-19; Pan Am. Maritime Neutrality Convention, Feb. 20, 1928, art. 27, 47 Stat. 1989, 1994. The Treaty of Amity, by contrast, requires "prompt payment of just compensation" for property taken by either party, specifies that "[s]uch compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken," and states that "adequate provision shall have been made at or prior to the time of the taking for the determination and payment thereof." Treaty of Amity, Art. IV(ii). Thus the Treaty readily can be given full effect without any implementing legislation, a factor that is critical to determining whether a Treaty is self-executing and thus affords a private right of action. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) ("RESTATEMENT") § 111, Reporters' Note 5 at 54; *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985); *Columbia Marine Servs., Inc. v. Reffett, Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988). The High Seas and Maritime Neutrality conventions are unlike the Treaty of Amity for the additional reason that both are multilateral, a factor strongly indicating that they are non-self-executing. *See United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979).

Iran does not argue that the Treaty language relied upon by the courts below is insufficient to support a private cause of action in federal court. On the contrary, Iran recognizes that the right of private citizens to bring a cause of action in federal court under the property protection provisions of commercial treaties like the one at issue here is well-established. *See* Petition at 12; *see also Kolovrat v. Oregon*,

366 U.S. 187, 194 (1961); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *cf. Head Money Cases*, 112 U.S. 580, 598-99 (1884) (recognizing that treaty may "prescribe a rule by which the rights of the private citizen or subject may be determined," and that such a rule "may be enforced by a court of justice"). Thus, Iran argues not that the Treaty of Amity creates no private right of action, but instead that only Iranian citizens, and not Americans, may enforce the Treaty's protections in U.S. courts. Petition at 12; *see also* PA 10a-11a; PA 119a-120a. But Iran points to no support in the decisions of this Court or any other for its restrictive reading of the Treaty, nor have we found any. On the contrary, all five federal judges who have considered the question have agreed that the Treaty of Amity does afford a federal right of action to U.S. citizens. *See* PA 10a (Edwards, Rogers, Tatel, JJ.); PA 116a-121a (Flannery, J.); *American Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980) (Richey, J.), *modified on other grounds*, 657 F.2d 430 (D.C. Cir. 1981).

As both courts below observed in this case, Iran's reading of the Treaty flies in the face of Congress's express purpose in adopting it: to protect American citizens and their interests abroad. PA 11a;120a; *see also Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) (citing Senate hearings); Senate Report on Commercial Treaties with Iran, Nicaragua, and The Netherlands, 84th Cong., 2d Sess. at 1 (July 9, 1956). As both courts below also noted, moreover, this legislative purpose would be particularly frustrated by Iran's reading of the Treaty where, as here, the courts of the foreign sovereign "cannot provide adequate remedies for U.S. claims." PA 11a (citing *Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 587-88 (2d Cir. 1983)); PA 121a (same).

Furthermore, nothing in the Treaty language itself provides any support for Iran's lopsided view. Although the Treaty provides that each "High Contracting Party" — *i.e.*,

the United States and Iran — must protect the property rights of the other's nationals and afford them access to its courts, it nowhere states or even suggests that either nation is precluded from protecting the rights of its own nationals, or that nationals of either Party are limited to relief through the courts of the other Party. Treaty of Amity, Arts. III(ii) & IV(ii); *see Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 664-65 (W.D. Mich. 1985).

Similarly, although Art. XXI of the Treaty requires Iran and the United States to consult with one another on matters respecting the Treaty and to submit their disputes concerning its interpretation or application to the International Court of Justice ("ICJ"), it nowhere states or even implies that private parties like McKesson either must or may resort to this procedure. To the contrary, the ICJ's basic rules preclude McKesson from doing so.[11/] This provision therefore has no bearing at all on the manner or forum in which McKesson's disputes with Iran should be resolved. *See Kalamazoo Spice*, 616 F. Supp. at 664.

None of the authorities cited by Iran suggests otherwise. Petition at 13-14. The ICJ decision cited by Iran addressed the court's jurisdiction over disputes between Iran and the United States under Article XXI of the Treaty, not disputes involving private parties. *See Case Concerning United States Consular Staff in Tehran*, 19 I.L.M. 553, 565, ¶ 52 (1980). Similarly, Professor Wilson's comment arises in the context of his discussion of the rights of state parties under treaty clauses like Article XXI. *See* Robert R. Wilson,

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11/ *See, e.g.*, Ian Brownlie, PRINCIPLES OF PUBLIC INT'L LAW 585 (5th ed. 1998) (Article 34, para. 1, of the Statute of the [ICJ] provides simply: "Only States may be parties in cases before the Court."). Nor is there any merit to Iran's contention, Petition at 12 n.7, that McKesson had an alternative remedy in an international arbitration pursuant to the Investment Guaranty Agreement between the United States and Iran. *See* PA 8a.

UNITED STATES COMMERCIAL TREATIES & INT'L LAW 24-25 (1960). Finally, Professor Walker and the two State Department officials cited by Iran do not state that the Treaty affords American citizens no federal right of action. *See* Petition at 13 (citing Department of State Instruction A-18, July 23, 1954, at 2; Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearings Before the Senate Comm. on Foreign Relations, 84th Cong., 2d Sess. at 11 (1956); Herman Walker, Jr., "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 AM. J. COMP. L. 229, 239 (1956)). Instead, they merely state that the Treaty's dispute resolution provision protects American investors. *See id.* Their focus on that protection, rather than on a right of action in federal court, does not mean that they interpreted the Treaty not to give rise to such an action. Rather, it simply reflects the fact that the act of state and sovereign immunity doctrines, as applied by U.S. courts at the time, would have made it difficult if not impossible for a U.S. citizen to pursue an expropriation claim in federal court, under the Treaty or otherwise, against a foreign sovereign. Since 1956, of course, the rules governing sovereign immunity and the Act of State doctrine have been significantly liberalized. *See Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 251 (D.D.C. 1985) (noting that the FSIA, enacted in 1976, was intended to liberalize sovereign immunity law by codifying "restrictive" immunity), *vacated on other grounds*, 736 F. Supp. 1 (D.D.C. 1990); H. R. Rep. No. 94-1487, at 7-9, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-08 (same); *Kalamazoo Spice*, 729 F.2d at 424 (noting that this Court "began to limit the breadth of the act of state doctrine" after its decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)).

Iran also asserts that by allowing McKesson a cause of action in federal court under the Treaty of Amity, the court of appeals has "in effect strip[ped] away the sovereign immunity of the United States in Iranian courts." Petition at

14. Iran's concern is unwarranted. As we explain above, the question whether a party may assert a federal cause of action is distinct from the question whether a defendant is immune from the court's jurisdiction. *See Erienet*, 156 F.3d at 520 (citing *National R.R. Passenger Corp.*, 414 U.S. at 456). Thus, a party may have a cause of action in federal court against a foreign state, but be barred from pursuing it because the defendant is immune from suit. Iran offers nothing whatsoever to substantiate its claim that the court of appeals' recognition of a Treaty cause of action in this case will hamper (or have any impact on) the United States government's ability to assert its foreign sovereign immunity in the courts of Iran or any other country with which it has a similar treaty.

II. THE COURT OF APPEALS' REJECTION OF IRAN'S SOVEREIGN IMMUNITY CLAIM IS ENTIRELY CONSISTENT WITH THIS COURT'S RULING IN *NELSON*, AND ALSO WITH THE COURT OF APPEALS DECISIONS CITED BY IRAN.

Under the FSIA's direct effects exception, a foreign state defendant is not immune from suit if the plaintiff's cause of action "is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2)(clause 3). The court of appeals, like the district court, held that this exception bars Iran's sovereign immunity defense in this case. PA 6a-8a; PA 98a-102a. Iran's contention that the holdings below conflict with *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is unfounded. Petition at 14-17. A comparison of the two cases and what they actually held clearly shows that no conflict exists.

The plaintiff in *Nelson* was an American citizen who, while in the United States, had been recruited to work at a hospital in Saudi Arabia. 507 U.S. at 351-52. He later sued

the government of Saudi Arabia, alleging that it arrested and tortured him in Saudi Arabia for raising safety concerns at the hospital. *Id.* at 352-53. He countered the Saudi government's claim of sovereign immunity by citing the first clause of Section 1605(a)(2), which bars immunity when the plaintiff's cause of action is "based upon a commercial activity" that the foreign state "carried on in the United States."[12/] Nelson argued that his recruitment and hiring in this country provided the requisite "commercial activity . . . in the United States." *See* 507 U.S. at 354. This Court rejected that argument, holding that Nelson's various tort causes of action arising out of his arrest and torture in Saudi Arabia were not "based upon" his recruitment and hiring in the United States:

> While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the . . . allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case.

507 U.S. at 358.

Iran's reliance on *Nelson* to find an error in the courts' reasoning below is unconvincing. Here, there is no question that McKesson's cause of action against Iran for expropriation arises out of, and is "based upon," the commercial operation of Pak Dairy in Iran. Indeed, McKesson's claim for a taking of its entire investment arises directly from decisions made in the dairy's corporate board room, and carried out by the dairy's management, which resulted in a complete cessation of dealings with McKesson for the sole reason that McKesson was an American

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12/ Thus, the analysis of immunity in *Nelson*, unlike Iran's immunity claim in this case, did not involve the "direct effects" clause of Section 1605(a)(2).

company. That cessation of business dealings, and the consequent loss of McKesson's investment, undeniably had a direct effect on McKesson where it is headquartered, in the United States. PA 5a-8a; PA 99a-100a.

Iran has singled out one element of the cessation in dealings, the deliberate withholding of dividend payments, and has argued that it did not have a direct effect in the United States and therefore cannot be included as an element of McKesson's claim. Petition at 14-20. That is an issue, however, that need not be reached by the Court. The court of appeals correctly reasoned that there was no need to determine whether Iran's refusal to pay McKesson's dividends had a direct effect: *Nelson* does not require that ***every*** element of a claim be jurisdiction-conferring. Jurisdiction was sufficiently established by the cessation of dealings relied upon in *McKesson I*. *See* PA 7a-8a; *see also Nelson*, 507 U.S. at 357-58 & n.4.

Iran mischaracterizes *Nelson* as "teach[ing] that when a litigant invokes the direct effect clause . . ., the only acts that may be relied upon are actionable acts that themselves cause a direct effect." Petition at 22. This gets *Nelson* precisely backwards. The Court did not say that a foreign state's liability may be determined only by reference to those acts that confer jurisdiction on the court. On the contrary, the Court expressly cautioned that it was not requiring every element of the claim to be jurisdiction-conferring. 507 U.S. at 357-58 & n.4.

In sum, neither *Nelson* nor any of the federal appellate decisions cited by Iran as "in conflict with" the decision below prevents a court, once its jurisdiction is established, from determining whether the defendant is liable based on acts that are part of the same cause of action but that might not independently confer jurisdiction. Indeed, *Nelson* itself clearly envisions such a scenario, 507 U.S. at 358 & n.4, as do several of the other cases cited by Iran. *See, e.g.*, *Voest-Alpine v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998)

("based upon" language in Section 1605(a)(2) means that the act conferring jurisdiction "must form the basis of ***at least some element*** of the cause of action") (citing *Nelson*, 507 U.S. at 357) (emphasis added); *Sun v. Taiwan*, 201 F.3d 1105, 1109-10 (9th Cir. 2000) (holding that an "'action is based on a commercial activity in the United States if ***an element*** of the plaintiff's claim consists in . . . commercial activity carried on in the United States,'" and that "[t]he entire case need not be based on the commercial activity of the defendant") (citing *Nelson*, 507 U.S. at 358 n.4) (emphasis added).

Having failed to identify a conflict with *Nelson* based on its construction of that case, Iran seeks to achieve the same result by mischaracterizing McKesson's cause of action for expropriation as being based entirely on the withholding of two dividends. *See* Petition at 23-24. That is absurd. The Pak Dairy board deliberately and discriminatorily breached McKesson's entire relationship with the dairy. It did so by cutting off dividends, shareholder communications, and financial data, as well as the constant flow of capital, management personnel, engineering, data, machinery, equipment, materials, and packaging that had long supported McKesson's investment in Pak Dairy. All of this conduct is attributable to Iran. PA 169a-172a. Iran thus deprived McKesson of its entire investment.

The district court correctly took into account Iran's wrongful actions, beginning in 1979, and held that it was bound by the Claims Tribunal's determination that the evidence of expropriation of McKesson's entire investment in Pak Dairy as of January 19, 1981 was "finely balanced." PA 104a-108a, 114a-115a.[13/] After January 19, 1981, the

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13/ The Tribunal found that beginning in May 1979, in addition to halting payment of dividends to McKesson, Pak Dairy ceased rental payments to McKesson for milk carton filling machines and appropriated the machines for its own use, as well as payments owing under a Technical Assistance Agreement for supplies, ingredients, spare

district court found, Pak Dairy continued to declare and pay cash dividends each year to its Iranian shareholders, but adhered to its decision not to pay "any sums of money for any reason to foreign share holders." PA 106a, 107a ("Iran's manifestation of assent to the denial of dividends came from the highest levels of the Iranian government when the Pak Dairy board members sought approval from their agency heads before acting.") (citing *McKesson II*, PA 171a). By May 1982, the date by which the creeping expropriation was held to have ripened into a compensable claim, Pak Dairy had failed to pay McKesson's dividends for four consecutive years. During that same period, the dairy continued to withhold payments due under its various contracts with McKesson, and to deny McKesson access to financial data and shareholder information. As the court of appeals observed, "Pak Dairy's board and its government shareholders forced the dairy to disregard its commercial

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machinery parts, trademark fees, and back salaries for McKesson employees who had served in key positions, including Frank Fisher, the Dairy's Managing Director. Tribunal Award at 252-56 (L 209-L 213). By November 1979, government directors at Pak Dairy required that the Dairy "reconsider" all of its "foreign contracts" and that no further payments should be made under them. *Id.* at 245 (L 202). In November 1980, Iranian government representatives ousted Mr. Fisher, one of McKesson's two representatives on the Pak Dairy board of directors, thus depriving Foremost of most of the benefits of cumulative voting as provided under local law and leaving Iran in control of six of the seven seats on the Dairy's board. *Id.* at 247 (L 204). Further, the Dairy's new Iranian managing director was instructed by the board to cease sending accounts and financial statements or other information to the United States and to stop translating such material into English as had been the practice. *Id.* at 244 (L 201). Although McKesson was able to nominate a second representative to the board in May 1981, it soon became clear that the hostility of the Dairy's government-controlled board towards McKesson, because it was American, rendered McKesson's representation on the board entirely ineffective and meaningless. *See* Third Affidavit of Leonard Patterson (May 6, 1996) ("Patterson Aff. III") at ¶20 (L 249). Accordingly, in October 1981, McKesson's two representatives resigned from the Dairy's board. *Id.*

mission and its duties to McKesson as a shareholder." PA 169a.

Iran's assertion that the district court relied only on the non-payment of dividends and two "legally insignificant" acts, Petition at 23, is plainly incorrect. The district court relied on all of the factors cited by the Tribunal, *see supra* n. 13; PA 104a-116a, PA 97a-98a. As the court of appeals made plain in *McKesson III*, it regarded the "'freezing out [of] American corporations in their ownership of Pak Dairy,'" as the act causing a direct effect and hence establishing subject matter jurisdiction, and the "cut off of the 'constant flow of capital, management, personnel, etc. between the two companies, as well as the abrupt end of 'McKesson's role as an active investor'" as the manifestation of that act. PA 6a-7a (quoting *McKesson I*, PA 151a-152a). Iran cites no authority to support its contention that the withholding of shareholder communications, and depriving McKesson of a meaningful voice in Pak's management, were "legally insignificant." Petition at 21, 23; *see* PA 106a-107a. Similarly, Iran points to no support for its contention that "[i]f . . . the dividends were paid, regardless of whether all other contacts were cut off, a court could not say McKesson had been deprived of its shareholding interest." In sum, Iran's efforts to confine the scope of McKesson's claim solely to the withholding of dividends has no support in fact or law, and thus provides no adequate grounds for review of the court of appeals' decision.

To this same end, Iran argues that its interference with McKesson's right as a shareholder to participate in the management of Pak Dairy, resulting in the cessation of contacts between Pak and McKesson, was not an "actionable act" because, it contends, there was no showing that this act violated Iranian law. Petition at 20-21. This is both irrelevant and incorrect. The district court, having found that McKesson had alternative causes of action under the Treaty of Amity and customary international law, deemed it irrelevant whether McKesson was also entitled to relief

under Iranian law. PA 116a n.23. Nor did the court of appeals need to consider whether McKesson's claims were actionable under Iranian law. PA5a-19a. In any event, as Iran itself concedes, McKesson's expert did in fact opine that Iranian law provided a cause of action for interference with a shareholder's opportunity to participate and vote freely in shareholder meetings. *See* Petition at 21 & n.19.

Finally, Iran asserts that even if this act of interference was "actionable," it had no direct effect in the United States. *See* Petition at 22. The sole basis for this assertion is that, in moving for summary judgment, Iran filed a statement of material facts not in dispute asserting that "[n]one of the actionable acts that Iran is alleged to have committed in this case entailed *an obligation to pay in the United States,*" that McKesson did not respond by filing a counter-statement of material facts in dispute, and that McKesson stated that there were no genuine issues of fact for trial on either party's summary judgment motion. *See id.* (emphasis added). There is no merit to Iran's position. First, the "undisputed" assertion upon which Iran relies so heavily is largely a non-sequitur: many if not most of the "actionable acts" that McKesson alleged, such as the interference with McKesson's right as a shareholder to a voice in Pak Dairy's management, do not entail an "obligation to pay" at all. Their effect on McKesson was nevertheless "direct" and in the United States, as the court of appeals held in *McKesson I* and confirmed in *McKesson III*. *See* PA 7a; PA 152a. With respect to those acts that did entail an obligation to pay, such as the withholding of dividends, the place of payment is immaterial to the determination of jurisdiction here. As explained above, jurisdiction is established by the freeze-out of McKesson in its ownership of Pak Dairy. Furthermore, as explained below, the effect of Iran's actions on McKesson in the United States was direct because McKesson is headquartered in this country.

Second, it is inconsequential that McKesson did not file a counter-statement of material facts in dispute. The district

court expressly ruled that McKesson had no obligation to do so, recognizing that such a filing would have been inconsistent with the fact that McKesson itself had filed for summary judgment, and thus had taken the position that there were no genuine disputes of material fact. The court of appeals did not disturb that ruling in *McKesson III*, and Iran has not challenged it here. *See* Petition at i; PA 1a-19a.

III. IRAN'S "PLACE OF PAYMENT" ARGUMENT PROVIDES NO BASIS FOR REVIEW.

Iran once again asks this Court to decide whether the effect of a foreign state's failure to pay money it owes to an American corporation may be found to be "direct" and "in the United States" only if the payment was supposed to have occurred in the United States. *See* Petition at i, 17-20; *see also* 95-644 Pet. 7-13, L 152-L 157. That issue is not presented here, however, because the court of appeals did not decide it. *See* PA 7a. The reasons for not reaching the issue below, moreover, apply equally here: the district court's jurisdiction was established by conduct other than the failure to pay dividends, and there is no merit in Iran's contention that, under *Nelson* and the direct effects clause, a foreign state's liability may be based only on facts that could have independently served a ground for jurisdiction. *Id.*; *see supra* at 15-21.

In any event, as McKesson demonstrated in 1995 when Iran first petitioned for a writ of certiorari on this question, there is no support for Iran's position that a "place of payment" in the United States is the *sine qua non* of direct effects jurisdiction. *See* 95-644 Opp. at 5-12 (L 374-L 381).[14/] In *Weltover*, 504 U.S. at 618-19, for example, this

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14/ Iran relies largely on the same arguments and cases here as it did in its unsuccessful 1995 petition. *Compare* Petition at 17-20 *with* 95-644 Pet. 7-13 (L 152-L 157).

Court held that a place of payment in New York, without more, was ***sufficient*** to establish direct effects jurisdiction even though all of the parties were foreign entities and there was no other connection to the United States. Iran, however, reads *Weltover* as establishing this sufficient condition as a ***necessary*** one, even where the party to which payment is wrongfully denied is a United States corporation. Iran argues that although an unfulfilled obligation to make payment in the United States is enough to satisfy the direct effect test, no amount of other effects, however direct, can satisfy the test. There is no support for this constricted reading of *Weltover*. In fact, it is contrary to the Court's holding in that case that an effect is "direct" for purposes of the statute if it follows "as an immediate consequence of the defendant's . . . activity." 504 U.S. at 618.

None of the court of appeals decisions cited by Iran conflicts with the decision below. *See* Petition at 18-19 & nn.14-16. On the contrary, two of them expressly reject the very same "place of payment" test that Iran proposes. *See Keller v. Central Bank of Nigeria*, 277 F.3d 811, 817-18 (6th Cir. 2002); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 895 (5th Cir. 1998); *see also Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-12 (5th Cir. 1985) (holding that "the question of whether there was a direct effect in the United States can be resolved without reference to the place of payment" because the plaintiffs "were located in the United States," and "the effects of [the defendant's] breach were inevitably felt by them there"). The other cases on which Iran relies either mirror *Weltover* in holding that a U.S. place of payment is sufficient to establish jurisdiction where there is no other connection to the United States,[15/] or are distinguishable from this case on their facts.[16/] In

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15/ *See Adler v. Nigeria*, 107 F.3d 720, 730 (2d Cir. 1997); *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987).

16/ *See United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (defendants' performance had

Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146-47 (D.C. Cir. 1994), for example, the plaintiffs were foreign corporations suing a foreign sovereign for acts committed abroad. Thus, the situs where payment was due was important because none of the parties, and none of the challenged conduct, had any connection to the United States. Here, by contrast, McKesson is an American corporation with its primary place of business in San Francisco. Iran's decision to withhold McKesson's dividend payments thus had as a direct consequence McKesson's non-receipt of those payments in the United States, regardless of where the monies were to be paid initially by Pak Dairy.[17/]

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no connection at all with the U.S.; here, by contrast, defendant's acts resulted in the interruption of a flow of funds, personnel, machinery, etc. between Iran and the U.S.); *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (1993) (court relied on lack of evidence that use of aircraft at issue was related to substantial commerce with the U.S.; here, by contrast, there was evidence of substantial commerce between McKesson in the U.S. and Pak Dairy in Iran); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385-86 (8th Cir. 1993) (court's finding of no direct effect based on fact that plaintiff's alleged future injuries were contingent and speculative; here, McKesson's injuries have already occurred); *Gregorian v. Izvestia*, 871 F.2d 1515, 1527-28 (9th Cir. 1989) (court merely noted that district court had not cited any nexus between defendant's acts and the United States, and remanded the case for factual findings on that issue).

17/ Iran suggests that a court may not consider the nationality and location of the plaintiff in determining whether it has felt a direct effect in the United States because the direct effect clause "draws no distinctions between citizens and aliens," and because this Court "declined to draw distinctions between U.S. citizens and aliens" in *Weltover* and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). Petition at 19 n.15. Recognizing that a corporation feels the effects of another's action toward it where it is headquartered does not require a court to "draw distinctions" between citizens and aliens, but merely to appreciate reality. *See, e.g., Callejo*, 764 F.2d 1111-12 (because plaintiffs were located in U.S., effects of defendant's breach "were inevitably felt by them there"); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) (breach of contracts had direct effect where

IV. IRAN'S UNSUPPORTED AFFIDAVITS AND LEGAL OPINIONS CANNOT SUPPORT SUMMARY JUDGMENT IN ITS FAVOR.

Iran argues that its affidavits and legal opinions regarding the alleged "come to the company" requirement require summary judgment in its favor. The court of appeals, by contrast, ruled that these materials were barely sufficient to preclude summary judgment in McKesson's favor, and then only because the court mistakenly thought that McKesson had adduced "no evidence" on the "come to the company" issue. PA 13a. In fact, as explained more fully in the conditional cross-petition for a writ of certiorari filed by McKesson concurrently with this opposition brief, the evidence before the courts below established beyond doubt that no "come to the company" requirement existed or was adopted by Pak Dairy.

As for Iran's various legal opinions and affidavits, not one of them cites a single Iranian statute, regulation, court decision, or other legal authority suggesting that Iranian law requires shareholders to come to the company for their dividends.[18/] On the contrary, as the court of appeals ruled,

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corporate buyer was located). *Verlinden* and *Weltover* are not to the contrary; rather, they merely hold that "'the FSIA permits a foreign plaintiff to sue a foreign sovereign in the courts of the United States, *provided the substantive requirements of the Act are satisfied.*'" *Weltover*, 504 U.S. at 619 (emphasis added) (quoting *Verlinden*, 461 U.S. at 489). In neither case did the Court suggest that the consideration of any fact relevant to the jurisdictional inquiry, such as the plaintiff's citizenship or place of residence, is forbidden.

18/ Iran makes much of the fact that McKesson did not file its own expert legal opinions on the "come to the company" issue. A federal court is not bound, however, by the substance of an expert's testimony on the content of foreign law, even where, as here, the testimony at issue is not challenged by an opposing expert. *See* Fed. R. Cir. P. 44.1; *Chantier Naval Voisin v. M/Y Daybreak*, 677 F. Supp. 1563, 1567 (S.D. Fla. 1998). This is particularly true where, as in this case, the expert opinions in question are unsupported and otherwise flawed. *In re Chase*

Iran's legal opinions "fall short of proving ... a legal requirement applicable to all Iranian corporations." PA 12a. To the contrary, as the court noted, they demonstrate that Iranian law ***does not require*** shareholders to come to the company, and instead permits corporate boards to select any method of disbursing dividends. *Id.*

Similarly, not one of Iran's opinions or affidavits cites anything in Pak Dairy's Articles of Association, board meeting minutes, shareholder meeting minutes, or any other company document to suggest that the Dairy ever adopted a "come to the company" procedure for its shareholders. On the contrary, despite his access to his employer's books and records, Pak Dairy's chief accountant, Alireza Dadyar, could not point to a single document in support of his ***speculation*** that such a requirement was "chosen by Pak Dairy, either by its General Meeting [of shareholders] or [by its Board of Directors] pursuant to authority under Article 57 of the Articles of Association" and the Iranian Commercial Code. L 300. Nor could he provide even an approximate date on which this alleged requirement was adopted, or explain the contrary assertion by his superior at Pak Dairy, Massoud Pezeshk, that McKesson needed only to "refer to or otherwise correspond with" Pak Dairy in order to receive its dividends. *See id.*; L 235.

Manhattan Bank, 191 F. Supp. 206, 207-08 (S.D.N.Y. 1961) (refusing to accept expert's "ingenious" interpretation of Panamanian statutes in the absence of "further authority" supporting that interpretation). The Ninth Circuit's decision in *Universe Sales Co., Ltd. v. Silver Castle*, 182 F.2d 1036 (9th Cir. 1999), cited by Iran, Pet. at 25, is not to the contrary. There, as the court noted, the district court refused even to consider the expert's opinion on the foreign law issue in question. 182 F.3d at 1038 n.2. Here, by contrast, the district court considered the opinions of Iran's experts in three separate memorandum opinions, and each time found them wanting. PA 110a-112a; Appendix to Conditional Cross-Petition ("CA") at CA 20a-22a; CA 23a-28a.

As McKesson demonstrated, moreover, other evidence in the record conclusively established that Pak Dairy never adopted any such requirement.[19/] For example, the McKesson employee responsible since 1976 for corporate and legal affairs relating to Pak Dairy, Leonard Patterson, testified by affidavit from personal knowledge that McKesson was never aware of a "come to the company" requirement, and that if such a requirement had existed McKesson was never apprised of it by anyone from Pak Dairy or anywhere else.[20/] Mr. Patterson also testified on cross-examination by Iran at trial that before the cut-off of dividends by Pak's board of directors, McKesson routinely received its dividends in San Francisco through normal banking channels within a few weeks after the dividends were declared by the Pak Dairy board.[21/] In addition, among the many minutes in the record of Pak Dairy shareholders' meetings and board of directors' meetings between 1979 and 1982, not one contains so much as a hint that Pak Dairy ever required its shareholders to come to the company for their dividends.[22/] Similarly, none of the correspondence between

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19/ *See generally* Conditional Cross-Petition at Section I.

20/ L 19-20. This testimony is consistent with Mr. Patterson's prior affidavit, and is corroborated by contemporaneous evidence: a June 5, 1980 telex from McKesson to Pak Dairy stating that McKesson was unaware of any legal basis for Pak's denial of its written demand for payment of its dividend. *See* L 243 (Third Affidavit of Leonard M. Patterson (May 6, 1996)) ("Patterson Aff. III"); L 121; *see also* Appendix to Plaintiffs' Motion for Partial Summary Judgment, Exh. 2 (Affidavit of Frank Fisher ("Fisher Aff.")) at ¶ 25 (L 33) (describing process for paying dividends during Mr. Fisher's tenure as Pak Dairy's Managing Director from 1964 to 1979, and making no mention of a "come to the company" procedure).

21/ *See* Trial Transcript (1/20/00) at 56:8-16 (L 42).

22/ *See* Fisher Aff., Exh. 6 (minutes of annual shareholders' meeting, April 15, 1979) (L 331) Appendix to Plaintiffs' Memorandum of Law in Support of Motion for Sanctions under Rule 37, Fed. R. Civ. P., and for Appropriate Findings (Oct. 30, 1992) ("Sanctions App."), Exh. 41 (minutes of shareholders' meeting, Oct. 14, 1979) (L 309);

the parties mentions a "come to the company" requirement. On the contrary, in responding to McKesson's written demands for payment of its dividends, the Dairy's management simply reported that its board of directors had directed that such payments to Americans or "foreign shareholders" were not allowed.[23/] The evidence showed that the Dairy's board of directors denied dividends to McKesson for one reason only: McKesson was American and the Dairy had adopted anti-American policies imposed by the Government of Iran.

The Tribunal, (which included an Iranian arbitrator) ***unanimously*** rejected Iran's "come to the company" defense in deciding that Pak Dairy's withholding of McKesson's dividends for 1979 and 1980 was "a clear breach of [its]

Fisher Aff., Exh. 13 (minutes of board meeting, Nov. 15, 1979) (L 333); Sanctions App., Exh. 44 (minutes of board meeting, Dec. 5, 1979) (L 311); Sanctions App., Exh. 45 (minutes of board meeting, Feb. 17, 1980) (L 314); Sanctions App., Exh. 46 (minutes of board meeting, March 10, 1980) (L 318); Sanctions App., Exh. 47 (minutes of board meeting, April 9, 1980) (L 323); Sanctions App., Exh. 49 (minutes of board meeting, April 14, 1980) (L 327); Patterson Aff. III, Exh. 14 (minutes of shareholders' meeting, Nov. 16, 1980) (L 347); Patterson Aff. III, Exh. 11 (minutes of board meeting, March 17, 1981) (L 337); Patterson Aff. III, Exh. 12 (minutes of annual shareholders' meeting, April 11, 1981) (L 342); L 262 (minutes of board meeting, April 29, 1981); (L 268) (minutes of board meeting, August 8, 1981); L 491 supplementary minutes of board meeting, Sept. 23, 1981); L 271 (minutes of board meeting, April 4, 1982).

23/ *See, e.g.*, Patterson Aff. III, Exh. 7 (Telex of May 21, 1980 from Pak Dairy to McKesson) (L 45) (responding to McKesson written demand for payment by stating that, "due to decision and instruction of the board of directors, Pak Dairy can not pay any sums of money for any reason to foreign share holders"). Sanctions App. Exh. 51 (Minutes of Pak board meeting, June 3, 1980) at ¶ 6 (L 122); Minutes of Pak board meeting on April 29, 1981 (L 262, L 266); Patterson Aff. III, Exh. 12 (minutes of annual Pak Dairy shareholders' meeting on April 11, 1981, at 2 (L 47); telex from Pak Dairy to McKesson on September 28, 1981 (L 180).

duty" to pay declared dividends to all of its shareholders."[24/] The Tribunal's ruling, and its underlying rejection of the "come to the company" defense, are preclusive of the issue, at least as to the period up to January 19, 1981.[25/]

Describing the alleged requirement, Dadyar characterized it as "the mode of payment chosen by Pak Dairy . . . [since] long ago, in particular in 1981 and 1982 and up to the present." Dadyar Aff. II ¶ 2 (L 295). But to the extent Dadyar's statement refers to a requirement supposedly adopted by Pak Dairy ***before*** January 19, 1981, it is entitled to no weight because of the Tribunal's binding decision on this issue. If his statement is construed to imply a requirement adopted by Pak Dairy ***in 1981***, it is entitled to no weight because of Iran's failure, after 20 years of arbitration and litigation, to produce even a shred of substantiating evidence from the official records of the company.[26/]

Finally, the district court correctly concluded, "based on the entire record in this case, including the opinion of the Claims Tribunal . . . that it would have been futile for McKesson to attempt to comply with the alleged come-to-the-company requirement." *McKesson*, PA 112; CA 22a. Although the court of appeals held this to be an issue for trial, that conclusion is untenable. In March 1981, McKesson asked its duly authorized Iranian representative on the Pak Dairy Board, Gholam Vahdati, to present a formal request for payment of McKesson's dividends at the next Pak Dairy Board meeting. Patterson Aff. III, Exh. 9 (March 6,

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24/ *See* Tribunal Award at 252 (L 209); *see also* Pak Dairy Complementary Statement of Defense filed with the Tribunal (1983) (L 182-L 184).

25/ *See* Amicus Brief of the United States on Force of Iran-U.S. Claims Tribunal Decision in This Proceeding (June 6, 1996) (L 286-291); PA 95a-98a.

26/ *See also* Conditional Cross-Petition at Section I.

1981 telex from McKesson to Gholam Vahdati) (L 124). Vahdati delivered a written demand ***in person*** to Pak Dairy's board of directors on April 29, 1981. L 262-L 267 (minutes of April 29, 1981 Pak Dairy board meeting). The minutes show that the demand was referred to an Iranian government body responsible for "International Claims" for review. The dividends were never paid.

In sum, Iran's affidavits and opinions not only are unsupported and self-contradictory, but also are contradicted by substantial and uncontraverted record evidence showing that Iran's "come to the company" defense is without any merit. Accordingly, Iran's affidavits and opinions do not support Iran's request that this Court review the decisions of the district court and court of appeals denying summary judgment in favor of Iran. *See, e.g., Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 314 (D.C. Cir. 1988).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 16, 2002